

FINMA Guidance

01/2018

**Implementing the requirement for amending financial contracts
(Art. 12 para. 2^{bis} BO in conjunction with Arts. 56 and 61a BIO-
FINMA)**

21 March 2018

1 Introduction

As set out in Article 12 para. 2^{bis} BO in conjunction with Article 56 BIO-FINMA, banks may agree new financial contracts or amendments to existing financial contracts which are governed by foreign law or a foreign jurisdiction only if the counterparty recognises a stay on termination of contracts by FINMA in accordance with Article 30a BA.

Under Article 61a BIO-FINMA, this requirement must be met within 12 months, i.e. as of 1 April 2018 (Phase 1) for contracts with domestic and foreign banks and securities dealers, and within 18 months, i.e. as of 1 October 2018 (Phase 2) for contracts with other counterparties. These transitional periods have been set in line with the feedback received from the industry during the consultation on the partial amendment of BIO-FINMA. FINMA may also extend the implementation deadline on request for individual institutions where this is justified.

2 Challenges of implementation

Since the conclusion of a new transaction under an existing master agreement already constitutes an amendment to an existing contract,¹ many existing contracts have to be amended in order to allow for the conclusion of new transactions. Practice has shown that amending the relevant contracts is a much more time-consuming task than had originally been assumed by the industry.

In the absence of an amendment to a contract, it would be possible to comply with the requirement specified in Article 12 para. 2^{bis} BO in conjunction with Article 56 BIO-FINMA by putting a trade stop in place. However, given industry reports of the number of counterparties currently affected by trade stops of this kind, significant impacts on the Swiss financial centre may be expected.

3 FINMA's supervisory practice

When assessing whether banks have implemented the requirements in a timely manner, FINMA considers it appropriate to make allowance for the damage that may be caused to the financial centre by a trade stop. Consequently, for a limited period (i.e. a maximum of nine months after

¹ See the FDF Explanatory Report dated 25 November 2015 on the Financial Market Infrastructure Ordinance, p. 57; the FINMA report dated 9 March 2017 regarding the consultation on the partial amendment of BIO-FINMA, p. 18.

expiration of the respective implementation deadline), FINMA will accept if banks forego declaring a trade stop in order to achieve full compliance.

FINMA's approach is predicated on the banks taking appropriate measures to make the necessary amendments to contracts as quickly as possible, in particular in relation to professional counterparties and those with high trading volumes. Banks are advised in particular to ensure that sufficient resources are earmarked for these tasks and to contact Phase 2 counterparties at an early stage. FINMA will accompany the implementation process in consultation with the institutions concerned.

The institutions affected must:

- be able to provide FINMA with information about their implementation status and set out in detail the measures which will be taken to ensure compliance with statutory requirements;
- be able to demonstrate that they are making sufficient progress in meeting the requirements;
- terminate a contractual relationship or halt trading, following a warning, if a counterparty definitively refuses to accept a contractual amendment.